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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20348

Robert Centolo
CGM

FILE: B-181332

DATE: December 28, 1976

MATTER OF: Monmouth Community Action Program

DIGEST: Claim of community action agency on behalf of organization with which it had contracted, for expenses incurred in good faith in connection with Office of Economic Opportunity's (OEO) refusal to fund grant which had been previously approved, is allowable in full, even with respect to grant beneficiaries who exceeded OEO income poverty guidelines, since there was no clear requirement in statute, published regulations, OEO instructions, or grant agreement that participants in project be selected solely on basis of income.

This decision results from an appeal of the partial disallowance of a claim presented by Monmouth Community Action Program, Inc. (MCAP) on behalf of Youth For Understanding, Inc. (YFU), for reimbursement of expenses incurred in connection with the funding of an Office of Economic Opportunity (OEO)¹/ grant.

STATEMENT OF FACTS

MCAP is a nonprofit corporation organized under the laws of New Jersey and in accordance with sections 210 and 211 of the Economic Opportunity Act of 1964, as amended (EOA), 42 U.S.C. §§ 2790 and 2791, engaged in the operation of community action programs within the scope of the Act. YFU is a nonprofit Michigan corporation engaged in the organization and administration of programs of international student exchange.

In March 1972, MCAP and YFU entered into an oral agreement whereby YFU undertook to arrange for travel and lodging abroad for a number of Monmouth County youths for the summer of 1972 if MCAP could obtain funding

1. OEO was replaced by the Community Services Administration (CSA) on January 4, 1975 pursuant to section 9(a) of the Headstart, Economic Opportunity, and Community Partnership Act of 1974, 42 U.S.C. § 2941(a) (Supp. V, 1975). Section 3 of this Act (Pub. L. No. 93-544) redesignated the Economic Opportunity Act as the Community Services Act of 1974 (although the former designation is used throughout this decision).

for the project from OEO. The program had been initially conceived in January 1972, and a preliminary application was submitted to OEO headquarters in Washington on February 2, setting forth the proposal and estimated budget in detail. On March 28, MCAP received a letter from the Deputy Regional Director, OEO New York Regional Office (NYRO), stating that funds would be available for "incentive grants" for "creative, imaginative, or innovative program proposals submitted to the regional office." The projects selected were to be funded under section 221 of EOA, 42 U.S.C. § 2808. Pursuant to this letter, MCAP on April 28 submitted seven formal applications for incentive grants, including the YFU project, to NYRO, which had been authorized to approve such applications. In this connection, an OEO document dated August 1971 had stated:

"Regional offices * * * will not need a specific formal headquarters concurrence before proceeding with the major thrusts of their plans. The region should assume that the plan meets the approval of the Office of Operations and should move ahead immediately to implement it."

By letter of June 5, 1972, the New Jersey Community Action Program Executive Directors Association notified all Community Action Program Directors of those projects that had been selected for funding by OEO. This list included the MCAP-YFU project. On June 15, the Deputy Regional Director of NYRO approved the grant by signing the OEO Form 314 (Statement of OEO Grant), and MCAP was notified to that effect. Based on this notification, 65 Monmouth County youths left for Europe on June 21. The travel expenditures were made by YFU in anticipation of reimbursement from MCAP under their agreement.

On June 26, the approved Form 314 was forwarded to MCAP and to Governor Cahill of New Jersey for his approval as required by EOA section 242, 42 U.S.C. § 2834. On July 6, Governor Cahill approved the grant, waiving the 30-day review period provided under section 242, and on the following day (July 7), NYRO advised MCAP by telegram as follows:

"Pleased to inform you that the Governor of your State has consented to this program. Allowable costs may be charged against the grant as of the effective date shown on the statement of OEO Grant [July 1, 1972]. We will expedite release of funds as soon as all required documents are received from you."

Governor Cahill's letter of approval to MCAP was dated July 19.

By this time, the project had become enveloped in considerable public controversy over the wisdom of using poverty funds for this type of activity. On July 20, Governor Cahill sent a second letter to MCAP stating that he was withholding his approval due to "questions as to the appropriateness of the program and the eligibility of participants." On July 21, MCAP received a telegram from OEO advising it not to expend any funds on the project. OEO subsequently refused to make any payments under the grant.

As a result of the widespread publicity and controversy generated by the project, hearings were held on August 17 and September 12, 1972, before the Special Studies Subcommittee of the House Committee on Government Operations.^{2/} Testimony was given by officials of YFU, MCAP, and OEO. By letter dated March 21, 1973, the Subcommittee recommended to OEO that it "honor its contract" with MCAP so that the latter could reimburse YFU "for services rendered in good faith." OEO on April 5, 1973, affirmed its refusal. A subsequent congressional request urging OEO to reconsider its position similarly failed to resolve the impasse. OEO then recommended that MCAP and YFU present their claim to the General Accounting Office for determination.

INITIAL SETTLEMENT

On June 29, 1973, YFU filed a claim with the General Accounting Office (GAO) Claims Division in the amount of \$54,260.40, representing the amount actually expended. The claim was disallowed by the Claims Division on November 15 because there was no "privity of contract" between YFU and the United States. On March 4, 1974, the MCAP Board of Trustees authorized YFU to file its claim in the name of MCAP for and on behalf of YFU, and admitted liability to YFU "only to the extent to which the Government of the United States is determined to be liable to MCAP." Thus redesignated, the claim was resubmitted in the same amount in April 1974.

We first looked at the question of "standing," and noted that the procedural device of claiming "for and on behalf of" the real party in interest found precedent in subcontractor claims in both the Court of Claims and the Armed Services Board of Contract Appeals. See, for example, Merritt-Chapman & Scott Corporation v. United States, 458 F.2d 42, 43 (Ct. Cl. 1972); Owens-Corning Fiberglass Corporation v. United States,

2. Hearings on Alleged Misuse of OEO Funds Before a Subcommittee of the House Committee on Government Operations, 92d Cong., 2d Sess. (1972) (hereinafter cited as "Hearings").

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419 F.2d 439, 453 (Ct. Cl. 1969); Snare & Triest Co. v. United States, 57 Ct. Cl. 151, 159 (1922); TRW, Inc., 66-2 BCA para. 5882 (1966). In the latter case, the Board pointed out that the prime contractor need not acknowledge liability to the subcontractor as a prerequisite to filing the claim, it being sufficient if:

"* * * the prime contractor acknowledge that he will be liable to the subcontractor if the Government is liable to him. * * * All the prime contractor is doing by proceeding or permitting the subcontractor to proceed in its name is seeking an authoritative determination in the forum that might ultimately have to decide the issue anyway."

In the present case, since the question of the liability of the United States to MCAP is integrally related to the liability of MCAP to YFU, we concluded that there was no jurisdictional bar to our considering the claim in the form presented.

Next, we noted the principle that the acceptance of a grant which is not unconditional creates a binding contract. United States v. County School Board of Prince George County, Virginia, 221 F. Supp. 93, 99 (E.D. Va. 1963); United States v. Sumter County School District No. 2, 232 F. Supp. 945, 950 (E.D. S.C. 1964); 41 Comp. Gen. 134, 137 (1961); 50 Comp. Gen. 470, 472 (1970).

We found that all the requirements for approval of the grant had been met, and that this approval was not affected by the Governor's July 20 attempt to withdraw his approval or, in the specific circumstances of this case, by the fact that YFU acted somewhat prematurely in incurring expenses. We also noted, however, that 23 of the youths involved came from families whose income exceeded the then-current poverty guidelines. Accordingly, we concluded that the claim should be allowed except for that portion relating to the participants who exceeded the income guidelines. Our certificate of determination stated in this regard:

"* * * Since OEO is the agency charged with the administration of the Economic Opportunity Act, as amended, 42 U.S.C. §§ 2790-2791, and since there is no basis upon which we may conclude that OEO's strict application of the [poverty] guidelines is unreasonable or plainly erroneous, we must accept its interpretation and therefore conclude that MCAP's inclusion

of 23 students in violation of the poverty guidelines was improper. Since compliance with these guidelines must be considered a condition of the grant, approval of the grant could not operate to bind the Government to the extent of MCAP's non-compliance."

Since the claim had been computed on the basis of \$800 per student, the allowable portion was determined to be \$54,260.40 minus \$18,400 (\$800 x 23), or \$35,860.40. Settlement in this amount was issued on November 25, 1974.

REQUEST FOR RECONSIDERATION

We were informally advised in early 1975 that claimant intended to request reconsideration of the disallowed portion of the claim. In preparation for this request, YFU in July 1975 requested from CSA, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, all CSA documents "regarding any limitation established and maintained [by OEO] and effective between January 1, 1972 and October 1, 1972, on the participation of persons from families having an annual gross income in excess of the income 'poverty guidelines' in programs sponsored under the Community Action Program and funded by OEO." CSA responded to this request on August 12.

On September 8, 1975, YFU submitted its request for reconsideration, arguing that it is entitled to recover the disallowed portion because:

- (1) Existing law does not prohibit the participation of "non-poor" persons in OEO-funded community action programs; and
- (2) Even assuming that the expenditures were questionable, OEO failed to follow statutory and contractual procedures for termination or suspension of the grant.

The request was referred to CSA for a statement of its position with respect to YFU's allegations. CSA, in its report to us dated February 26, 1976, argued that persons with family income in excess of the income poverty guidelines are "ineligible for assistance directly or indirectly in any manner," and that, notwithstanding the suspension or termination procedures, OEO could have disallowed the expenditures by audit pursuant to EOA section 243, 42 U.S.C. § 2835. YFU was then given the opportunity to comment on CSA's report, and upon our receipt of this comment the record was closed.

APPLICABILITY OF INCOME GUIDELINES

Income poverty guidelines are revised annually to reflect cost-of-living increases and are published in the Federal Register. 42 U.S.C. §§ 2971d, 2971b. The current guidelines are found in CSA Instruction No. 6004-11 (March 31, 1976), 41 Fed. Reg. 14370 (April 5, 1976). It is not disputed that 23 of the participating youths came from families whose income exceeded the then-current guidelines. Hearings, at 47 ff., 55. MCAP's justification for not applying the guidelines was explained as follows:

"In the majority of those cases our feeling is that there were extenuating circumstances. And our board has taken a position, which I would also leave with you, as to the philosophy regarding it. And basically it is that those 20 kids that were sent abroad whose parents' income exceeded their guidelines, the majority of them fall into extenuating circumstances. They are people whom we consider mostly the working poor, they are people with whom we have worked with [sic] before, and who have had problems where the second person has a job. In that particular sense if there wasn't a second job, then the person would fall back into the poverty guidelines. We have people who have had children who are epileptics and who have sicknesses and illnesses in families, things of that nature where there are hardships in the family. * * *

"And we feel they certainly should not be excluding them; we are then punishing a person because they go out and get a second job, that they have risen above the poverty guidelines, but not that high. * * *"
Hearings, at 51-52.

Although there were a few cases where family income was substantially in excess of the guidelines (e.g., \$32,000 in one case), and a few participants were related to MCAP members, most of the violations were "borderline" situations as described above.

Although the Economic Opportunity Act is obviously designed to aid the poor, it does not require that the income poverty guidelines be used to determine eligibility for all programs authorized under it. On the contrary, there is recognition in various sources that the guidelines are not required to be applied universally. For example, 42 U.S.C. § 2971d(a) requires that every agency administering programs under the Act "in which

the poverty line is a criterion of eligibility" shall revise the poverty line at least annually, the clear implication being that there are also programs authorized under the Act in which the poverty line is not a criterion of eligibility. See also: Ray Baillie Trash Hauling, Inc., v. Kleppe, 477 F.2d 696, 705, note 11 (5th Cir. 1973), where the Court noted that:

"* * * [T]he broad goal of the Economic Opportunity Act and the 1967 Amendment clearly contemplates that the beneficiaries of the Act need not be defined exclusively in terms of income. * * *

Turning specifically to the community action program, we have reviewed the text of the Economic Opportunity Act in its present form and as it existed in 1972; OEO/CSA regulations published in the Federal Register and codified in the Code of Federal Regulations; and OEO/CSA directives furnished in response to claimant's Freedom of Information Act request, and have been unable to find any clear requirement that participation in programs such as the YFU program be defined exclusively in terms of the income guidelines. We have also reviewed the grant agreement and all general and special conditions attached thereto, and similarly find no such requirement.

We have addressed the lack of specific eligibility criteria in the community action program in past reports. In 1968, we issued a report on our review of selected aspects of the community action program in Los Angeles.^{3/} In that report we noted:

"The Economic Opportunity Act of 1964, as amended, does not stipulate specific eligibility criteria with regard to those who may be served by the Community Action Program. Although the act clearly directs its benefits to low-income individuals and families, the definition of low income is left to determination by OEO.

"The eligibility criteria issued by OEO in its Community Action Program Guide are also general in nature. The Guide states that a Community Action Program must focus on the needs of low-income families and individuals and that agencies applying

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3. Review of the Community Action Program in the Los Angeles Area Under the Economic Opportunity Act, B-162865, March 11, 1968. Quoted portions are from pages 24-25 and 84-85.

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for Community Action Programs may have considerable flexibility in determining which families and individuals are to be assisted.

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"For certain major programs, such as Head Start or Upward Bound, which are relatively expensive in terms of cost per individual served, OEO uses an income table, referred to as a poverty guideline, as an indicator of whether a family is in poverty. ★ ★ ★"

In discussing a draft of our 1968 report with OEO prior to its issuance, we suggested that income be given much greater weight in the determination of eligibility. OEO disagreed, commenting in part as follows:

"OEO is unable to concur in the recommendations, which are not considered to have been based on observations of sufficient breadth.

"The OEO poverty guideline ★ ★ ★ is used as a standard in counting the poor at the national level and has been adopted by many of the OEO programs as an income criterion for measuring the extent of poverty and the degree of success of anti-poverty programs. This single criterion of poverty has not been promulgated indiscriminately for every antipoverty program and in every situation. There are several reasons why this has not been done. The following are among them:

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"4. It has been found that participation of at least some non-poor has contributed to the success of certain programs. ★ ★ ★

"5. Deprivation of an individual is not always reflected in terms of family income. ★ ★ ★"

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The following year, we issued the report of our comprehensive review of the entire economic opportunity program as directed by the Economic Opportunity Amendments of 1967.⁴/ We noted that:

"Studies made by the Social Security Administration since 1964 are the source of what is commonly called the 'poverty line.' * * * These criteria are the basis for the operational definition of poverty employed by OEO in establishing eligibility for the services under some of its programs. * * * (Emphasis added.)

* * * * *

"OEO has not prescribed income eligibility requirements for certain component programs of the [Community Action Program]. * * *

We recommended that:

"OEO consider adoption of income eligibility requirements for those locally initiated component programs of the [Community Action Program] such as education and manpower, which are directed to individuals or families and involve a significant unit cost, and for which income is not now an eligibility requirement."

The OEO directives we reviewed (e.g., OEO Instruction 6001-1, Eligible Activities, June 5, 1972; OEO Instruction 6001-03, Characteristics of Eligible Activities, May 10, 1971) reflect the ambiguity with respect to eligibility criteria which we addressed in our 1968 and 1969 reports. Indeed OEO Instruction 6001-03 consists primarily of a reprint of a portion of the "Community Action Program Guide" which we discussed in our 1968 report, quoted above.

To be sure, the EOA and its implementing directives speak in general terms of aiding the "poor." However, based on our review of the materials indicated above, we conclude that there was no clear requirement that the participants in the YFU project be defined solely in terms of income; i.e.,

4. Review of Economic Opportunity Programs, B-130515, March 18, 1969. Quoted portions are from pages 26, 40, and 42.

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that the youths selected by MCAP to participate in the YFU project come solely from families whose income did not exceed the "poverty guidelines."

For example, the CSA report to us on this matter refers to OEO Instruction 6001-03, captioned "Characteristics of Eligible Activities," which states in part:

- "a. Benefit to the poor. A community action program must focus on the needs of low-income families and individuals. Where the nature of the activity requires administration by areas or groups, service and assistance shall be made available only in areas and for groups which have a high incidence of poverty. Means tests are not required to screen out individuals or families above specific income levels; however, the applicant will be required to provide adequate evidence that any proposed activity will indeed be concentrated on the needs of the poor. Where the applicant agency selects a 'target' area or population group that does not include the poorest residents of the community, adequate reasons for such selection must be provided."
(Emphasis added.)

While the application and effect of the quoted language is not entirely clear, there appears to be no violation here. As YFU's request for reconsideration points out, the instant program "was targeted for disadvantaged youths of Monmouth County and nearly 66 percent of the program participants came from families falling below OEO's income poverty guidelines." Thus, to the extent that the program was "targeted" for purposes of the above-quoted Instruction, the target group included the poorest residents of the community. It also "focused" and was "concentrated on" the poor in view of the percentage of low-income participants.

The CSA report also cites section 8 of OEO Instruction 6168-1a, captioned "Youth Development Program Policies," which states that "[t]he population to be served by Youth Development Programs shall be youth between the ages of 14 and 25 who are eligible under current Office of Economic Opportunity income poverty guidelines." While compliance with the poverty guidelines is thus specifically required for Youth Development Programs, it appears that the instant YFU project was conceived and treated as an "incentive grant" (Hearings, pp. 34-5) rather than a Youth Development Program grant.

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CONCLUSION

For the reasons set forth above, upon reconsideration of this matter, we now hold that OEO's interpretation as to applicability of the poverty guidelines to the instant grant was plainly erroneous. Accordingly, the claim for \$18,400 initially denied on the basis that 23 persons participated who were not eligible under the poverty guidelines is allowed and a settlement will issue in due course. In view of this disposition, it is unnecessary to consider the additional arguments presented in support of the claim.

R. F. K. 1/11/71
Acting Comptroller General
of the United States